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Nos. 77-1232, 77-6283 and 77-6291

In the Supreme Court of the United States

OCTOBER TERM, 1977

LARRY A. CARR, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD B. ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

CLEO H. BULLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not reported.

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[1]"Pet. App." refers to the appendix to the petition in No. 77-6291.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1977. A petition for rehearing was denied on February 3, 1978. The petition for a writ of certiorari in No. 77-6283 was filed on March 1, 1978, in No. 77-6291 on March 3, 1978, and in No. 77-1232 on March 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a memorandum prepared by petitioner Carr was properly admitted into evidence.

2. Whether the trial court erred in failing to grant petitioner Carr's mid-trial motion for a severance.

3. Whether, as petitioner Bullard contends, the trial judge acted improperly in requesting the jury to continue its deliberations.

4. Whether testimony given by petitioner Anderson at a non-custodial administrative hearing, where verbatim *Miranda* warnings were not given, was properly admitted into evidence against him at the instant trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioners were convicted of conspiring to sell, and selling, unregistered securities by the use of fraudulent, manipulative, and deceptive practices. Petitioners Anderson and Bullard were each convicted on six counts.[2] Petitioner Carr was

[2]These were conspiracy, in violation of 18 U.S.C. 371 (Count I); sale of unregistered securities, in violation of 15 U.S.C. 77e(a) and 18 U.S.C. 2 (Counts II and III); fraud in the sale of securities, in violation of 15 U.S.C. 77q(a) and 18 U.S.C. 2 (Counts IV); and the use of manipulative and deceptive practices in the sale of securities, in violation of 15 U.S.C. 78b and 78ff and 18 U.S.C. 2 (Counts V and VI).

Petitioner Anderson was acquitted on three other counts charging mail fraud and interstate transportation in furtherance of a fraud. Co-defendants Charles D. Linza and Joseph R. Merola were acquitted on all counts. Co-defendant Dalton Smith died prior to trial.

acquitted of selling unregistered securities but convicted on the conspiracy and fraud charges (Counts I and IV). Anderson was sentenced to three years' imprisonment on each of Counts I through IV and two years' imprisonment on the remaining counts, all terms to be served concurrently. Bullard and Carr both received concurrent 18-month prison terms. The court of appeals affirmed (Pet. App. A).

The evidence showed that, in late 1972, co-defendant Smith conceived a plan to take over a shell corporation, inflate the price of its stock to an artificial level, and then "blow it off" to an unsuspecting public (Tr. 321-328, 691). Bullard, the principal shareholder of Patterson Corporation, provided his firm as the vehicle for the manipulation. He and Anderson revised the shareholder list of Patterson so that the actual owners were dropped (without their knowledge) and were replaced by nominees of Bullard and Smith (Tr. 548-555, 573-575; Pet. App. 2).

The next step was to raise the price of the Patterson stock. Smith and Anderson arranged for the acquisition of helicopter parts variously valued at between $20,000 and $6 million in exchange for Patterson stock and a small amount of cash (Tr. 344-347, 352). Financial statements were then prepared which valued the parts at the fictitious amount of $22 million (Gov't Exh. 57). Through the use of payoffs and kickbacks, a number of stock brokers were enlisted to "make a market" in

Patterson through controlled sales among themselves (Tr. 1705-1710). The plan was to push Patterson's price from its value of twenty-five cents to ten dollars per share, at which point it would be "blown off" on the public. By September of 1973, the scheme had inflated the stock price to $2.25 per share (Tr. 2020).

In September 1973, Patterson acquired Carr's construction company, Homes of America, and installed Carr as Senior Vice-President for Marketing. Carr's duties included the preparation of various brochures that portrayed Patterson as a financially sound organization (Tr. 5468-5480). In reality, the material improperly represented the assets by omitting financial liabilities and including assets never held by the firm.

A month later Anderson was called to testify before the Securties and Exchange Commission (SEC), where he admitted elements of the fraud, testifying as to the falsity of the financial reports issued by Patterson (Tr. 2649-2666; Pet. App. 3).

On November 1, 1973, Carr replaced Anderson as President of Patterson (Tr. 5269). The SEC suspended trading of Patterson's stock on November 21, 1973.[3] Despite this, there was an attempt to continue the manipulation. According to the testimony of Michael Gardner,[4] co-defendant Merola came to him at the request of Carr seeking his assistance in reviving the scheme. Merola told Gardner that Carr wanted him to purchase the outstanding shares from Smith so that he

[3]Patterson was then trading for $3 per share.

[4]An unindicted co-conspirator who helped arrange for the stock brokers who assisted in the manipulation of the price of Patterson stock.

could take charge of the scheme (Tr. 1764-1778). However, this never occurred and the manipulation collapsed.

ARGUMENT

1. Petitioner Carr claims (Pet. No. 77-1232, pp. 6-9) that a memorandum he prepared should not have been admitted into evidence, on the ground that its admission violated his Fourth Amendment rights. This claim has no foundation.

a. To begin with, Carr lacks standing to raise the issue that the "Patterson Priorities" memorandum should have been suppressed. He was not on the premises at the time the document was obtained,[5] he had neither a proprietary nor a possessory interest in the property, and the offense he was charged with did not include possession as one of its elements. *Brown* v. *United States,* 411 U.S. 223, 229. See also *United States* v. *Miller,* 425 U.S. 435.

Nor do the facts bear out Carr's assertion that the documents were not subject to seizure since they were personal property. The documents were prepared by Carr to promote the corporation; that he wrote them in his own handwriting is irrelevant. Further, Carr made no attempt to remove them when he resigned from Patterson. The documents thus had a relation to Patterson and not to Carr and accordingly he had no "reasonable expectation of freedom from governmental intrusion."[6] *Mancusi*

[5]Carr had in fact resigned from Patterson prior to the time that the documents were obtained.

[6]Petitioner cites *Andresen* v. *Maryland,* 427 U.S. 463, as authority on the issue that the memorandum was a personal record. However, that case, which dealt with the privilege against self-incrimination, only noted the obvious in separating a law clerk's handwritten title search notes which related to the defendant's legal business and not his real estate company. *Id.* at 468, n. 2.

v. *DeForte*, 392 U.S. 364, 368. See also *United States* v. *Britt*, 508 F. 2d 1052 (C.A. 5), certiorari denied, 423 U.S. 825; *Lagow* v. *United States*, 159 F. 2d 245 (C.A. 2), certiorari denied, 331 U.S. 858, rehearing denied, 332 U.S. 785.

b. In any event, the documents were voluntarily turned over to the government by Joe Stewman, an officer of Patterson (Tr. 2936-2938). Holding the proper authority, he could legitimately turn over corporate documents voluntarily, as he did here, and thus remove any question that they were improperly obtained. See *United States* v. *Matlock*, 415 U.S. 164.

2. Petitioner Carr's other contention (Pet. No. 77-1232, pp. 9-11), that a severance should have been granted him owing to a conflict between co-conspirator Gardner's testimony and Merola's potential testimony, is equally insubstantial.

Co-conspirator Gardner testified as a government witness that in December 1973 or January 1974, co-defendant Merola contacted him on behalf of Carr for the purpose of arranging for Gardner to collect all the outstanding Patterson stock from co-defendant Smith so that Carr could revive the manipulation (Tr. 1772-1778).

In a statement he gave to Postal Inspector Ingraham (Tr. 2929-2930), Merola had stated that Smith had told him to retrieve all the Patterson stock so as to prevent Gardner from obtaining funds that should go to Patterson.

The court ruled that Merola's statement to Ingraham was inadmissible on the ground that Merola may have believed that he would not be prosecuted if he talked (Tr. 3097-3098). Merola stated that he would be willing to testify at a separate trial. Carr then asked for a severance

at what was the mid-point of the trial. The judge denied the motion (Tr. 3099-3100).

Petitioner's complaint is that, because the severance was denied and Merola's statement to the Postal Inspector was ruled inadmissible, he was deprived of an opportunity to present critical exculpatory evidence. But there is a basic flaw in the argument.

First, although Merola indicated that he would testify at a subsequent trial, we do not know what his testimony would have been: Petitioner Carr never tested the matter, through a motion for a new trial or otherwise. It may or may not be correct to suppose that Merola's testimony would have been consistent with his statement to the Postal Inspector or otherwise helpful to Carr.

However, even assuming, with petitioner, that the statement reflects what Merola would say at a severed trial, it would not exculpate Carr. Indeed, what Merola told the Inspector was that at one time Smith asked him to obtain the Patterson shares *from Gardner*. Since Gardner relinquished his shares before the last week of September 1973 (Tr. 1758-1759), this request must have occurred earlier. Although Carr is not implicated here, this evidence is in no way inconsistent with Gardner's testimony that later, in December 1973 or January 1974, Merola relayed a message from Carr asking him (Gardner) to obtain the shares *from Smith*, who now held them. In sum, the statements are entirely compatible, and there is no reason to believe that Merola, if called to testify, would not have confirmed both of the two quite separate incidents.[7]

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[7]The court of appeals was mistaken in stating (Pet. App. 5) that "the Government learned from Merola that his statement implicating Carr in the revival of the scheme was not true." All the Postal

Thus, even if the trial judge had allowed the statement into evidence, the jury would have been able to recognize the totally different situations. In light of this consideration, and the overwhelming evidence linking Carr to the conspiracy and fraud, the trial court acted within its discretion to deny the motion to sever. See *Schaffer* v. *United States*, 362 U.S. 511; *Opper* v. *United States*, 348 U.S. 84.[8]

3. Petitioner Bullard contends (Pet. No. 77-6291, pp. 5-8) that the trial judge improperly requested the jury to continue its deliberations after it had reported itself "deadlocked."[9] The deliberations began after eleven weeks

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Inspector learned from Merola was that he allegedly carried a message from Smith to Gardner when the latter was in possession of Patterson shares, and, as we have explained, this does not contradict the evidence that Merola was also later used by Carr as an intermediary.

[8]Petitioner Carr further contends that the exculpatory testimony and Merola's willingness to give it at a separate trial necessitated a severance. See *United States* v. *Echeles*, 352 F. 2d 892 (C.A. 7). Even assuming petitioner's contentions, granting a severance in this situation is a rare occurrence. See *United States* v. *Finkelstein*, 526 F. 2d 517 (C.A. 2), certiorari denied *sub nom. Scardino* v. *United States*, 425 U.S. 960. A trial judge must weigh other factors. These include: judicial economy in having to hold an additional trial (*United States* v. *Shuford*, 454 F. 2d 772, 777 n. 5 (C.A. 4)), whether the potential testimony would be subject to damaging impeachment (*Byrd* v. *Wainwright*, 428 F. 2d 1017, 1021 (C.A. 5)), and the weight of the testimony that would be presented (*United States* v. *Kaplan*, 554 F. 2d 958, 966 (C.A. 9)). Applied here, these considerations refute the claim that the judge abused his discretion.

[9]The instruction in question was (Tr. 6432):

> Ladies and Gentlemen of the jury, at this time you will be allowed to go home and tomorrow morning at 9:00 o' clock I would request that you continue your deliberations following the same pattern that you have previously. I'm not going to make any comments beyond what I have just said.

of testimony in a complicated securities fraud trial, involving six defendants and six counts. After what had really been only two days of deliberations,[10] the jury reported that it had reached a verdict as to all but defendant Bullard (Tr. 6431). The trial judge considered this request and asked the jury to go home and convene again in the morning. He refused to comment in any way. The next morning, the jury returned its verdict convicting Bullard.

This Court has held that a trial judge may properly issue requests to a jury so long as they are not coercive. *Jenkins* v. *United States*, 380 U.S. 445. A simple request that a jury continue its deliberations is not impermissibly coercive.[11] *United States* v. *Peterson*, 549 F. 2d 654 (C.A. 9); *United States* v. *Minieri*, 303 F. 2d 550 (C.A. 2). In the context of a long and complex trial, requiring the jurors to return and asking them to continue their deliberations on a further day was well within bounds. See *Walsh* v. *United States*, 371 F. 2d 135, 136 (C.A. 9).

4. Petitioner Anderson asserts (Pet. No. 77-6283, pp. 5-7) that his testimony at an administrative hearing should not have been admitted into evidence, since the hearing, he alleges, was a disguised criminal investigation, and he was not given a verbatim *Miranda* warning. This claim is insubstantial.

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[10]The jury had also spent nearly three days hearing testimony read back to them.

[11]Petitioner relies heavily on *United States* v. *Bass*, 490 F. 2d 846 (C.A. 5), for the proposition that a request to continue deliberations can be coercive. However, this case significantly differs from *Bass* in that the judge refused to make any comments. In *Bass*, the court appeared to urge the jurors to reach a unanimous agreement. *Id.* at 854. Further, *Bass* has been significantly limited by the Fifth Circuit's later ruling in *Bokine* v. *United States*, 523 F. 2d 767 (C.A. 5). There, the court specifically found no coercion in a judge's request that the jury continue to deliberate.

Anderson was called to testify before an attorney of the Securities and Exchange Commission concerning the activities of Patterson Corporation (Tr. 2585-2586). The SEC was investigating the market in Patterson's stock in its role as regulator of the securities markets. The SEC's investigation led to a suspension of trading in Patterson stock on November 21, 1973, and a successful civil suit to enjoin trading, filed on April 11, 1974. Thus, what petitioner portrays as a civil proceeding designed to gather criminal evidence, was in fact a valid investigation to protect the securities purchasing public.

When Anderson appeared before the SEC he was voluntarily provided with a comprehensive review of his rights (Tr. 2586-2589). In fact, the only divergence from the standard *Miranda* warning was the absence of the phrase that an attorney would be provided if he could not afford one.[12] This action went far beyond what the SEC need have done. This Court has ruled in *Beckwith* v. *United States*, 425 U.S. 341, that *Miranda* warnings need only be given in cases of custodial interrogation. In that case, the Internal Revenue Service was not required to provide the warnings to a taxpayer being interviewed by its investigators, even though the investigators were concededly conducting a criminal inquiry. This case involves no greater degree of custody or restraint by government officials. See also *Oregon* v. *Mathiason*, 429 U.S. 492.

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[12]It should be noted that Anderson repeatedly waived his right to counsel (Tr. 2588, 2627).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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